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YOU CAN'T BE SERIOUS: CRITICAL REFLECTIONS ON THE LIABILITY THRESHOLD FOR DAMAGES CLAIMS FOR BREACH OF EU PUBLIC PROCUREMENT LAW AFTER THE EFTA COURT'S *FOSEN-LINJEN* OPINION

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Abstract

This paper offers some reflections on the position advanced by the EFTA Court that a simple breach of EU public procurement law is in itself sufficient to trigger the contracting authority's liability in damages (Fosen-Linjen). I argue that this position is flawed because it deviates from previous case law of the Court of Justice of the European Union (Spjåker), and because it is based on interpretive errors and internal contradictions in the EFTA Court's reasoning. In criticising the EFTA Court's Judgment from the perspective of the harmonisation of EU law, I rely on the better view of the UK Supreme Court. The latter held that the liability of a contracting authority for the breach of EU public procurement rules under the remedies directive is assimilated to that of the State under the general EU law doctrine of State liability and thus requires a sufficiently serious breach (Nuclear Decommissioning Authority). My reflections are based on the need to keep procurement damages litigation constrained to its main function and limited to justified cases. I use this normative position to argue against the expansion of private enforcement of EU public procurement law as a correction of the shortcomings in its public enforcement.

1 INTRODUCTION

The academic, and now also judicial, debate around the regulation of remedies for breach of EU public procurement law has focused on, amongst other issues, the contested relationship between the potential liability in damages derived from the

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Remedies Directive¹ and the general principle of State liability for breaches of EU law.² The Remedies Directive requires Member States to grant a power to their review bodies or courts to ‘award damages to persons harmed by an infringement’ of relevant EU public procurement rules (Art 2(1)(c)). Following the principle of procedural autonomy, the conditions for the regulation of this right to damages are deferred to Member States’ legislation, subject to compliance with the general principles of effectiveness and equivalence.³ On its part, the principle of State liability also allows for damages claims due to breaches of EU law, which at least *in principle* covers procurement law despite the existence of the Remedies Directive.⁴ This doctrine (generally referred to as *Francovich* doctrine) requires Member States – or public bodies for which they are responsible,⁵ including the judiciary⁶ – to have incurred in a ‘sufficiently serious breach’ of EU law as a condition for damages claims by the affected individuals.⁷

The existing debate about the relationship between these two regulatory mechanisms boils down to disagreements over whether the Remedies Directive should

¹ Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33, as amended by Directive 92/50/EEC [1992] OJ L 209/1, and by Directive 2007/66/EC [2007] L 335/31 (hereinafter, the ‘Remedies Directive’). A consolidated version is available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1989L0665:20080109:en:PDF>>.

² Following the Judgments of the Court of Justice of the European Union of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Others* EU:C:1991:428, and of 5 March 1996 in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* EU:C:1996:79.

³ Judgment of the Court of Justice of the European Union of 30 September 2010 in Case C-314/09 *Strabag and Others* EU:C:2010:567, paras 33-34; Judgment of the Court of Justice of the European Union of 9 December 2010 in Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* EU:C:2010:751, para 92. See also Steen Treumer, ‘Enforcement of the EU Public Procurement Rules: The State of Law and Current Issues’, in *ibid* & Francois Lichère (eds), *Enforcement of the EU Public Procurement Rules* (DJØF 2011) 17, 37–39.

⁴ A strict position could be foreseen under a unifying thesis, where it could be argued that the adoption of the Remedies Directive displaced the doctrine of State liability in this area of EU economic law. Seemingly along these lines, see Treumer (n 3) 39. Similarly, Roberto Caranta, ‘Many Different Paths, But Are They All Leading To Effectiveness?’ in Treumer & Lichère (eds), *Enforcement of the EU Public Procurement Rules* (n 3) 53, 71. However, this could hardly avoid the application of the general principle of State liability, as would derive from a functional equivalent interpretation of Judgment of the Court of Justice of the European Union of 19 January 2010 in Case C-555/07 *Küçükdeveci* EU:C:2010:21, see in particular para 27. See also Judgment of the Court of Justice of the European Union of 1 March 2011 in Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* EU:C:2011:100, see in particular para 32.

⁵ See Judgment of the Court of Justice of the European Union of 10 October 2017 in Case C-413/15 *Farrell* EU:C:2017:745. For discussion, see Albert Sanchez-Graells, ‘Interesting clarification (and broadening) of the Foster test on ‘emanation of the State’ for purposes of direct effect of EU Directives (C-413/15)’ (howtocrackanut, 10 October 2017) <<http://www.howtocrackanut.com/blog/2017/10/10/interesting-clarification-of-the-foster-test-on-emanation-of-the-state-for-purposes-of-direct-effect-of-eu-directives-c-41315?rq=farrell>> accessed 16 September 2018.

⁶ Judgment of the Court of Justice of the European Union of 30 September 2003 in Case C-224/01 *Köbler* EU:C:2003:513; Judgment of the Court of Justice of the European Union of 13 June 2006 in Case C-173/03 *Traghetti del Mediterraneo* EU:C:2006:391. For discussion, from a procedural autonomy perspective, see Nicolo Zingales, ‘Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law’ (2010) 11 German Law Journal 419.

⁷ Michal Bobek, ‘The effects of EU law in the national legal systems’, in Catherine Barnard & Steve Peers (eds), *European Union Law*, 2nd edn (Oxford University Press 2017) 143, 170–171.

be constructed as a particularisation of the general principle of State liability under EU law (a ‘unifying thesis’) or whether a distinction should be made between ‘a public law of torts in the form of Member State liability, and damages for breaches of specific EU legislation under the effectiveness postulate (the ‘separation thesis’)’.⁸ The unifying thesis would result in the superimposition of the requirement of ‘sufficiently serious breach’ to the award of damages under the Remedies Directive. Conversely, the separation thesis would result in a free-standing interpretation of the liability threshold in the Remedies Directive, and possibly in a reduction of the threshold of infringement triggering potential liability in damages. This would aim to avoid what has been considered ‘the paradoxical result [...] that although the remedies regime is more concrete and elaborate than in other areas of the law, the Court [of Justice] would be forced into the abstract generalities of Member State liability, rather than the specificities of the procurement sector’.⁹ This is the specific legal issue with which this paper is concerned.

Interestingly, this is a systemic issue that the Court of Justice of the European Union (CJEU) explicitly addressed in *Spjiker*,¹⁰ when it stated that Art 2(1)(c) of the Remedies Directive:

[...] *gives concrete expression to the principle of State liability* for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible [...].¹¹

[...] as regards state liability for damage caused to individuals by infringements of EU law for which the state may be held responsible, *the individuals harmed have a right to redress where the rule of EU law which has been infringed is intended to confer rights on them, the breach of that rule is sufficiently serious, and there is a direct causal link between the breach and the loss or damage sustained by the individuals. In the absence of any provision of EU law in that area, it is for the internal legal order of each member state, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.*¹²

It is worth stressing that, in a second layer of case law, the CJEU has created additional specific constraints on the exercise of their procedural autonomy by the Member States when establishing the specific conditions for claims for damages. For example, the CJEU has barred the possibility of subjecting the liability in damages of a contracting authority to a requirement of fault or fraud,¹³ even if claimants can benefit from a

⁸ Hanna Schebesta, *Damages in EU Public Procurement Law* (Springer 2016) 8. For extended discussion, see *ibid* 65-71, in particular 67-68.

⁹ *ibid* 71.

¹⁰ *Spjiker*, EU:C:2010:751.

¹¹ *ibid* para 87 (emphasis added).

¹² *ibid* para 92 (emphasis added).

¹³ Judgment of the Court of Justice of the European Union of 14 October in 2004 Case C-275/03 EU:C:2004:632.

rebuttable presumption of fault.¹⁴ It has also declared the incompatibility with EU law of requirements that made a claim for damages conditional upon a prior finding of unlawfulness of the direct award of a public contract, where the action for a declaration of unlawfulness was subject to a six-month limitation period that started to run on the day after the date of the award of the public contract in question, irrespective of whether or not the applicant in that action was in a position to know of the unlawfulness affecting the decision of the awarding authority.¹⁵ CJEU case law has also prevented national procurement review bodies and courts from raising of their own motion infringements other than those supporting a claim for damages, where owing to the unlawfulness raised of their own motion, the court or review body would dismiss the action on the basis that the award procedure was in any event unlawful and the harm which the tenderer may have suffered would therefore have been caused even in the absence of the unlawfulness alleged in the claims for damages.¹⁶ The CJEU has imposed these additional constraints because the imposition of any such requirements (*eg* of fault, or exclusive causation) would erode the effectiveness of the right to damages under the Remedies Directive (Art 2(1)(c)).

In my view, there could not be a closer formulation of the unifying thesis than the one formulated in *Spijker*,¹⁷ whereby it is clear that Art 2(1)(c) of the Remedies Directive fleshes out or particularises the doctrine of State liability for breaches of EU law in the context of public procurement.¹⁸ Moreover, nothing in the second layer of case law constraining the exercise of procedural autonomy by the Member States should be seen as potentially challenging this systemic or fundamental position. However, maybe surprisingly, *Spijker* is not (yet) universally seen as having settled the issue of the interaction between the grounds for actions for damages under the Remedies Directive and under the State liability doctrine, and some authors consider it irreconcilable with a reading of *Strabag* that would require Member States to ensure *strict liability* for breaches of EU public procurement law. In my view, those readings of *Strabag* are incorrect in that they miss the different levels of regulatory design at which *Spijker* (top layer) and *Strabag* (second layer) operate.¹⁹ In any case, as mentioned above, the main point of contention rests on what could be seen as a *lex specialis* understanding of the interaction between the two regulatory frameworks – ie a view

¹⁴ *Strabag* (n 3).

¹⁵ Judgment of 26 November 2015 in Case C-166/14 *MedEval*, C-166/14 EU:C:2015:779.

¹⁶ Judgment of 19 June 2003 in Case C-315/01 *GAT* EU:C:2003:360.

¹⁷ In agreement on the positive description, but criticising it normatively, see Schebesta (n 8) 65–72.

¹⁸ Some objections could be raised to the effect that, the Remedies Directive having been adopted in 1989, it could not have logically given expression to the principle of State liability for breach of EU law, as it was only formulated in 1991 in *Francovich* (n 2). However, such objections can be dismissed on the basis of different types of arguments. A practical argument is that the Remedies Directive was revised in 2007, when the principle of State liability was already consolidated in CJEU case law, and the EU legislator did not consider it necessary to make any changes to Article 2(1)(c). A jurisprudential argument could also be used to dismiss the objection, on the basis that the CJEU does not create general principles of EU law in its case law, but rather draws from them or declares them—which logically requires their pre-existence (arguably, from the origins of the Treaties). This is an issue that, however, exceeds the possibilities of this paper and, consequently, will not be assessed in any detail.

¹⁹ To the same effect, see the Judgment of the UK Supreme Court in *Nuclear Decommissioning Authority v EnergySolutions EU Ltd (now ATK Energy Ltd)* [2017] UKSC 34 per Lord Mance, at [24].

that the general condition for there to be a ‘sufficiently serious breach’ of EU law under State liability is contrary to the requirement for strict liability for breaches of EU procurement law, which would have led the Remedies Directive to impose a lower triggering threshold by solely mentioning the need for an unqualified infringement as sufficient ground for damages claims (Art 2(1)(c)).²⁰ The latter view has been reignited in a recent Judgment of the EFTA Court.

In its *Fosen-Linjen* Judgment,²¹ the EFTA Court issued an important Opinion on the interpretation of the Remedies Directive and, in particular, on the conditions for the recognition of a right to damages compensation where the contracting authority uses an illegal award criterion and subsequently decides to cancel the tender for that reason.²² That is, the case concerns the existence and boundaries of the right to claim damages in situations where it is clear (and acknowledged by the contracting authority itself) that the procurement procedure was not fully compliant with substantive EU/EEA public procurement rules—which comes to constrain the legal analysis to the question whether the irregularity is such as to allow disappointed tenderers to claim damages compensation. These possibly exceptional circumstances make the case particularly relevant for the assessment of the threshold of non-compliance with EU law at which the contracting authorities of the Member States risk liability in damages vis-à-vis tenderers and potentially interested economic operators.

The *Fosen-Linjen* case raised a number of issues in the six questions sent to the EFTA Court by the Norwegian Frostating Court of Appeal (*Frostating lagmannsrett*), such as the threshold for liability, evidentiary requirements, causation, exoneration causes and due diligence requirements. All of them are important but, in my view, the main relevance of the case concerns the threshold of liability, on which the EFTA Court found that:

A *simple breach* of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of Directive 89/665/EEC, provided that the other conditions for the award of damages are met, including, in particular, the condition of a causal link.²³

The EFTA Court reached this position in answer to a series of questions and sub-questions concerning whether liability under the Remedies Directive was conditional:

²⁰ Whether this is compatible with a unifying thesis or with a separation thesis, or neither of them, remains unclear, but this aspect of the discussion exceeds the possibilities of this paper.

²¹ Judgment of the EFTA Court of 31 October 2017 in Case E-16/16 *Fosen-Linjen AS v AtB AS*, <http://www.eftacourt.int/fileadmin/user_upload/Files/Cases/2016/16_16/16_16_Judgment_EN.pdf>. For discussion, see Totis Kotsonis, ‘Case E-16/16, Fosen-Linjen AS and AtB: An EFTA Court case clarifying key aspects of EU procurement legislation’ (2018) 27(2) Public Procurement Law Review NA60-NA69 <<https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Competition/case-e-1616-140218>>.

²² In *Fosen-Linjen* (n 21), the violation derived from the lack of verification of self-declared fuel efficiency information that carried a significant weight in the evaluation and assessment of the tenders. It was common ground that the contracting authority had violated the applicable EU procurement rules and their national transposition.

²³ *Fosen-Linjen* (n 21) para 82 (emphasis added).

(i) upon the contracting authority having deviated markedly from a justifiable course of action, (ii) upon it having incurred a material error that justified a finding of culpability under a general assessment, or (iii) upon it having incurred in an inexcusable ‘material, gross and obvious error’ (question 1), or whether liability can be triggered under a test of ‘sufficiently qualified breach’ where the contracting authority was left with no discretion as to how to interpret or apply the infringed substantive rule (question 2). These questions thus sought clarification on how to apply the general requirement for a ‘substantial breach’ of EU public procurement law in the context of claims for damages. Surprisingly, the EFTA Court decided not to clarify how to interpret the requirement, but rather to exclude the applicability of the requirement altogether – which in my view represents an improper deviation from the CJEU *Spijker* Judgment. It is also remarkable that the EFTA Court did this despite the possibility of having provided a useful answer to the referring Norwegian court without engaging with this issue.

Indeed, the EFTA Court decided to group the first two questions referred to it and address them together. In my view, this was determinative of the outcome of the case—ie the finding that *any breach* of the EU public procurement rules can trigger liability in damages. Had the EFTA Court addressed the questions sequentially, and inverting their order, it would have been possible to establish that a breach of a substantive provision for which interpretation and application the contracting authority has no discretion constitutes a ‘sufficiently serious breach’ of EU/EEA procurement law triggering liability (if all other requirements are met), which would have rendered the other issues surrounding the interpretation of the requirement of sufficient seriousness moot and unnecessary in this case.

In that respect, it is worth stressing that the scope for the exercise of discretion in the context of procurement (which is bound to modulate the strictness of the liability imposed on contracting authorities, see section 3 below) was extended in the 2014 Public Procurement Package, and that contracting authorities do enjoy a rather high level of executive discretion within the constraints created by Member States in their domestic transposition. Thus, it is hardly defensible that ‘[i]n the very detailed provisions contained in the public procurement directives, [a] lack of discretion is manifest. A simple breach of the Directives could then be “sufficiently serious”, thus amounting to a liability closely approaching strict liability’,²⁴ which would erase any implications of the EFTA Court *Fosen-Linjen* Judgment. On the contrary, a significant number of decisions require the exercise of executive discretion and this should be subjected to more refined tests than considering *any* infringement of the directives as sufficiently serious *per se*.²⁵ The analysis of the *Fosen-Linjen* case should be undertaken

²⁴ Schebesta (n 8) 62.

²⁵ A Sanchez-Graells, *Public Procurement and the EU Competition Rules*, 2nd edn (Hart, 2015) ch 5; *ibid*, ‘Some Reflections on the ‘Artificial Narrowing of Competition’ as a Check on Executive Discretion in Public Procurement, in Sanja Bogojević, Xavier Groussot & Jörgen Hettne (eds), *Discretion in EU Public Procurement Law*, IECL Series (Hart, forthcoming).

from the perspective of its intended effect: ie a reduction of the threshold of infringement of EU public procurement law triggering potential liability for damages.²⁶

By choosing not to restrict its analysis to the circumstances of the case where the existence of a ‘sufficiently serious’ breach of EU procurement law seemed obvious (even considering space for discretion²⁷), the EFTA Court grabbed an opportunity to influence the development of EU/EEA law in the area of procurement remedies in a way that I am not sure will be productive in the long run, particularly because the rather extreme position taken by the EFTA Court – ie that any *simple breach* of EU/EEA procurement law suffices to generate liability for damages – was not really necessary under the circumstances and is at odds with the previous CJEU position in *Spijker*. This is relevant in the context of the *Fosen-Linjen* litigation as it reaches the Norwegian Supreme Court after the Frostating Court of Appeal decided not to follow the EFTA Court Opinion,²⁸ which will prompt the Norwegian Supreme Court to formulate its own view on the issue. On this point, it is interesting to stress that, in another recent Judgment raising the same point of law,²⁹ the UK Supreme Court took a diametrically opposing view to the EFTA Court’s and stressed the intimate interconnection created in the CJEU’s case law between the Remedies Directive and the general doctrine of State liability under EU law—thus limiting the existence of claims for damages due to a breach of EU public procurement law to those cases where there is a ‘sufficiently serious breach’. Comparing the approaches of the EFTA Court and the UK Supreme Court from the perspective of the harmonisation of EU law sheds some additional light on the flaws of the EFTA Court’s position (see section 2 below).

Beyond the issue of conformity with prior CJEU case law and the minimum harmonisation approach followed by EU law in this area, *in its own terms*, the finding by the EFTA Court that a simple breach of EU public procurement law suffices to trigger potential liability in damages is controversial. Firstly because of the way in which the EFTA Court couches the deviation of liability standards under the Remedies Directive and under the general doctrine of State liability for breach of EU/EEA law, which largely rests on an excessively formal reading of the test applicable to establishing State liability under the evolved *Francovich* doctrine. Secondly, due to the fact that the EFTA Court engages in contradictory normative assessments – which makes the interpretation and operationalisation of its main finding rather tricky. In my view, these two points of contention make it doubtful that the CJEU – which is not bound by the

²⁶ Cf speech by Carl Baudenbacher, President of the EFTA Court at the time of the *Fosen-Linjen* Judgment (n 21) (the Law Society, Competition Section, Annual Dinner, London, 22 November 2017) <<http://communities.lawsociety.org.uk/Uploads/m/r/w/baudenbacher-speech-competition-section-annual-dinner.pdf>> accessed 16 September 2018.

²⁷ Indeed, the obligation to assess the requirements included in the procurement documentation is absolute, see Judgment of the Court of Justice of the European Union of 4 December 2003 in Case C-448/01 *EVN and Wienstrom* EU:C:2003:651

²⁸ The decision was adopted on 2 March 2018. I am thankful to Prof Fredriksen for bringing this to my attention.

²⁹ *Nuclear Decommissioning Authority* (n 19).

EFTA Court's interpretation – will adopt the same approach in the future.³⁰ The issues also merit further discussion (see section 3 below).

The remainder of this paper offers more detailed critical reflections on the position advanced by the EFTA Court that a *simple breach* of EU public procurement law is in itself sufficient to trigger the contracting authority's liability in damages. The next section provides positive analysis of issues around the difficult fit of the EFTA Court's position with previous CJEU case law, and from the perspective of the harmonisation of EU law (2). The following section provides normative discussion of issues concerning the EFTA Court's own understanding of the purpose of the Remedies Directive and internal contradictions in the reasoning adopted in *Fosen-Linjen* (3). The conclusions bring these different lines of criticism together and reflect on the undesirability of promoting the private enforcement of EU public procurement law through maximum harmonisation by a revised Remedies Directive (4).

2 POSITIVE ANALYSIS: *FOSEN-LINJEN* DOES NOT FIT THE MINIMUM HARMONISATION OF PROCUREMENT REMEDIES

As mentioned above, the interaction between the right to damages under the Remedies Directive and under the general doctrine of State liability is contested, despite the CJEU's *Spijker* Judgment. This section adopts the perspective of the harmonisation of EU law to stress the intrinsic incompatibility between the configuration of the Remedies Directive as an instrument of minimum harmonisation and the EFTA Court's position in *Fosen-Linjen*. The discussion relies on the UK Supreme Court's analysis in *Nuclear Decommissioning Authority*, which I submit offers the proper interpretation of *Spijker* in the context of minimum harmonisation. Reflections on the possibility to engage in maximum harmonisation through a revision of the Remedies Directive are left for the conclusion (below section 4).

2.1. MINIMUM HARMONISATION THROUGH THE REMEDIES DIRECTIVE

The Remedies Directive is a minimum harmonization instrument that sets the basic elements of the effective and equivalent remedies that Member States must regulate for, in accordance with the peculiarities of their own domestic systems. This characterisation of the Remedies Directive is uncontroversial.³¹ Following the logic of minimum harmonization, it is possible for Member States to facilitate the existence of two potential tiers of remedies: a lower or more basic EU tier (subject *inter alia* to the requirement of 'sufficiently serious breach'), and a higher or more protective domestic tier (subject eg to a trigger for 'any infringement'). This higher or more protective tier

³⁰ This could happen in the decision of the pending reference for a preliminary ruling in Case C-518/17 *Rudigier* [2017] OJ C392/16, although the substance of the case and the way in which the question is put to the Court may not lead to an explicit answer on this occasion.

³¹ eg Report by the European Commission on the effectiveness of the Remedies Directive concerning review procedures in the area of public procurement, COM(2017) 28 final at 4, <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0028&from=EN>> accessed 16 September 2018.

may or may not exist depending on the policy orientation of each EU/EEA State, but it cannot be conceptualised as a requirement of EU public procurement law on the basis of the Remedies Directive. This approach has both the advantage of being in accordance with the current state of the law as interpreted by the CJEU (as discussed above), and of not imposing – as a matter of legal compliance, rather than policy preference – an absolute harmonisation of public procurement remedies, at least as the threshold of liability for damages is concerned.

To be sure, this approach is not without some relevant practical difficulties, as there is a thick mist of uncertainty concerning what is a sufficiently serious breach of procurement rules, in particular in areas of interaction between specific rules and the general principles of procurement – not least due to the universal application of the latter.³² There is also uncertainty as to what rules in the substantive EU public procurement directives are ‘intended to confer rights’ on the tenderers – ie the first *Francoovich* condition for the recognition of State liability, which has been so far largely untested. Providing clarity on these issues would require a significant reconceptualisation of the existing CJEU case law on the interpretation of substantive EU procurement rules. The existence of the preliminary reference mechanism of Art 267 TFEU could alleviate this legal uncertainty (in the long term), but not without creating a significant risk of collapse of the CJEU (or, at least, an even more significant growth in procurement-related preliminary references). From that perspective, the possibility to engage in maximum harmonization of remedies deserves some consideration (see below section 4). However, that needs to take place in the context of legal reform rather than as a result of judicial activism.

2.2 MINIMUM HARMONISATION AS SPELLED OUT BY THE UK SUPREME COURT

In its *Nuclear Decommissioning Authority* Judgment,³³ the UK Supreme Court followed what I think is the correct reading of *Spijker* against the background of minimum harmonisation by the Remedies Directive, and established that *Spijker* makes clear:

[...] that *the liability of an awarding authority is to be assessed by reference to the Francoovich conditions*. Subject to these conditions being met, ... [it goes] on to make clear that the criteria for damages are to be determined and estimated by national law, with the further caveat that the general principles of equivalence and

³² Art 18 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65. *Eg* an open question concerns whether a breach of a general principle of EU public procurement law must always be conceptualised as a sufficiently serious breach, which would be problematic because all decisions taken in a procurement exercise are subject to the principles of equality, non-discrimination, proportionality, transparency and competition. However, its analysis exceeds the possibilities of this paper.

³³ [2017] UKSC 34 (n 19). As per Lord Mance, with Lady Hale and Lords Neuberger, Sumption and Carnwath agreeing.

effectiveness must also be met ... Finally, [it] summarises what has gone before, repeating the need to satisfy the *Francovich* conditions.³⁴

More importantly, the UK Supreme Court considered that:

[...] there is [...] very clear authority of the Court of Justice confirming that the *liability of a contracting authority under the Remedies Directive for the breach of the [public procurement rules]* is assimilated to that of the state or of a public body for which the state is responsible. It *is in particular only required to exist where the minimum Francovich conditions are met, although it is open to States in their domestic law to introduce wider liability free of those conditions*.³⁵

Therefore, the UK Supreme Court followed a unifying thesis compatible with minimum harmonisation and took the clear view that *as a matter of EU law* the existence of grounds for an action in damages based on the Remedies Directive requires the existence of a ‘sufficiently serious breach’ of EU public procurement law. The UK Supreme Court explicitly ruled out any inconsistency between this approach and other case law of the CJEU, in particular *Strabag*, on the basis that the cases are not incompatible and, importantly, that the CJEU ‘in *Spijker* was aware of the recent decision in [*Strabag*], cited it in [...] and clearly did not consider it in any way inconsistent with what [it] said about the general applicability of the *Francovich* conditions’.³⁶ Importantly, the UK Supreme Court took no issue with the possibility for more generous domestic grounds for actions for damages.³⁷ On the whole, the UK Supreme Court considered that ‘there is no uncertainty or confusion in the Court of Justice’s case law, and that [it is safe to rely] on the clear language and ruling in *Spijker* as settling the position, whatever may have been previous doubts or differences of view at national level’.³⁸

2.3 IRRECONCIABILITY OF THE *FOSEN-LINJEN* JUDGMENT WITH MINIMUM HARMONISATION

In stark contrast with this approach, in its *Fosen-Linjen* Judgment, and despite the fact that similar arguments on the interpretation of *Spijker* were made before it (in particular by the Norwegian Government), the EFTA Court considered that:

Article 2(1)(c) of *the Remedies Directive* [...] *precludes national legislation* which makes the right to damages for an infringement of public procurement law by a contracting authority conditional on that infringement being culpable. [...] The same must apply *where there exists a general exclusion or a limitation of the remedy*

³⁴ *ibid.*, per Lord Mance, at [23] (emphasis added).

³⁵ *ibid.* at [25] (emphasis added).

³⁶ *ibid.* at [24].

³⁷ Although it eventually decided that this was not the case in relation to the *Public Contract Regulations 2006*; see NDA, per Lord Mance at [37], with which I also agree.

³⁸ *Ibid.* at [26], with reference to A Collins, ‘Damages in Public Procurement - An Illusory Remedy?’, in K Bradley, N Travers & A Whelan (eds), *Of Courts and Constitutions. Liber Amicorum in honour of Nial Fennelly* (Hart 2014) 339.

of damages to only specific cases. This would be the case, for example, if only breaches of a certain gravity would be considered sufficient to trigger the contracting authority's liability, whereas minor breaches would allow the contracting authority to incur no liability [...].

[...]A requirement that only a breach of a certain gravity may give rise to damages could also run contrary to the objective of creating equal conditions for the remedies available in the context of public procurement. Depending on the circumstances, a breach of the same provision of EEA public procurement could lead to liability in one EEA State while not giving rise to damages in another EEA State. In such circumstances, economic operators would encounter substantial difficulties in assessing the potential liability of contracting authorities in different EEA States.³⁹

This led the EFTA Court to reach the view that

A simple breach of public procurement law is in itself sufficient to trigger the liability of the contracting authority to compensate the person harmed for the damage incurred, pursuant to Article 2(1)(c) of the Remedies Directive, provided that the other conditions for the award of damages are met including, in particular, the existence of a causal link.⁴⁰

The EFTA Court does not clearly follow either a unitary thesis with a *lex specialis* twist—whereby it would come to subsume procurement damages claims under the State liability doctrine, but then immediately modify it on the basis of the literal wording of the Remedies Directive – or a separation thesis, whereby the constraints of the doctrine of State liability are simply set aside in a conceptualisation of the Remedies Directive as creating a parallel regulatory regime. Either way, the EFTA Court's position rests on an improper understanding of the level of harmonisation of EU law sought by the Remedies Directive.

In my view wrongly, the EFTA Court holds the implicit understanding that the Remedies Directive is an instrument of maximum harmonisation when it emphasises its 'objective of creating *equal conditions* for the remedies available in the context of public procurement'.⁴¹ The EFTA Court derives this objective in an earlier passage, where it stresses that a:

'[...] fundamental objective of the Remedies Directive is to create the framework conditions under which tenderers can seek remedies in the context of public procurement procedures, in a way that is as uniform as possible for all undertakings active on the internal market. Thereby, as is also apparent from the third and fourth recitals to the Remedies Directive, equal conditions shall be secured (sic)'.⁴²

³⁹ Fosen-Linjen (n 21) paras 77 and 78 (emphases added).

⁴⁰ *ibid* para 82 (emphasis added).

⁴¹ *ibid*, para 78 (emphasis added).

⁴² *ibid* para 66 (emphasis added).

This is a clear judicial excess. The Remedies Directive cannot reasonably be considered an instrument of maximum harmonization (*ie* a tool that sets a ceiling, or even a common core of protections that must be uniformly provided in all EEA States) in the way the EFTA Court does. In my view, this is particularly clear from recital (6) of the Remedies Directive, according to which: ‘it is necessary to ensure that *adequate procedures* exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement’⁴³ – which the EFTA Court includes in its Judgment,⁴⁴ but then largely ignores.

However, the EFTA Court does have a point when it stresses that the divergence of rules on damages remedies can distort the procurement field and, in particular, discourage cross-border participation – which could be alleviated by a reform of the Remedies Directive to create such maximum harmonization. Such revision and an explicit view on the elements of a uniform system of maximum harmonisation could bring a much-needed clarification of the function and position of different types of remedies under its architecture. Notably, it would clarify whether damages are a perfect substitute for other remedies (as the EFTA Court seems to believe), or rather (solely) an ancillary remedy.⁴⁵ Maximum harmonisation could also provide an opportunity to consider the creation of safe harbours (at least of damages liability) for purely procedural errors, or in the context of certain general guidelines. However, any and all of these reforms would require legislative intervention and, in my view, they are unsuitable for judicial activism. These issues are further considered in the conclusions (below section 4).

3 NORMATIVE ANALYSIS: INTERNAL CONTRADICTIONS IN THE EFTA COURTS’ VIEWS ON THE GOALS OF PRIVATE ENFORCEMENT OF EU PROCUREMENT LAW

Setting aside the positive or *de lege data* discussion had so far, it is also worth exploring some of the normative positions underpinning the EFTA Court’s activism in *Fosen-Linjen*, which sought to justify the deviation from the CJEU case law on the basis that (i) the State liability doctrine is incompatible with the special requirements of EU public procurement law and/or on the strength of (ii) conflicting normative assessments of the role for the risk of incurring liability for damages as an incentive for adequate legal compliance and effective performance of their procurement function by contracting authorities. In my view, both lines of argument are flawed. The first one because it relies on an excessively formalistic view of the requirement of subjective intent initially embedded in the State liability doctrine. The second because it relies on the assumption that private enforcement of EU public procurement law is

⁴³ (emphasis added); note that adequate procedures are not necessarily homogeneous or identical procedures.

⁴⁴ *Fosen-Linjen* (n 21) para 3.

⁴⁵ As I posit, Albert Sanchez-Graells, ‘“If it Ain’t Broke, Don’t Fix It”? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts’, in Simone Torricelli & Laurence Folliot-Lalliot (eds), *Oversight and Challenges of Public Contracts* (Brussels, 2018) 495-534.

and ought to be the main enforcement mechanism in this area of EU economic law. This section discusses both of these issues.

3.1 IS PUBLIC PROCUREMENT SPECIAL AND IS STATE LIABILITY SO SUBJECTIVE?

As discussed above (sections 1 and 2), the doctrinal issues in the background of the discussion surrounding the threshold of liability under the Remedies Directive concerns its relationship with the general doctrine of State liability for breach of EU/EEA law. As mentioned above, the position taken by the EFTA Court in *Fosen-Linjen* on this point is not very clear, but it seems to indicate that the EFTA Court considers that procurement law is somehow special, in a manner that could be compatible with either a separation thesis or a modified unitary thesis.

Whether the Remedies Directive is seen as a particularisation of the State liability doctrine (unitary thesis), or as a parallel system to ensure the effectiveness of EU public procurement law (separation thesis) can have further normative implications concerning the question of the threshold for the imposition of liability on contracting authorities. Both theories would in the abstract seem compatible with the imposition of an entry threshold at ‘sufficiently serious breach’ level as a trigger for damages actions.⁴⁶ However, the incompatibility of such an approach with a separation theory has been linked to the available justifications to escape liability on the basis that the breach does not reach the required level of *seriousness*. Or, in other words, on the assumption that *strict liability* needs to control this area of EU economic law. As most fully formulated, the separation theory seems to require the triggering of remedies at a lower threshold of infringement than general State liability under EU law – *ie* at simple breach – on the basis that the general theory includes an element of subjective assessment based on the intent of the Member States that can be too lenient, which would ultimately reduce the effectiveness of EU public procurement law. Indeed, it has been argued that under the general conditions for State liability:

[...] the ‘mens rea’ or intention of a Member State is taken into account ... By contrast, the type of duty and the connected justifications under the public procurement regime are those contained in the legislative regime. Strict observance of the rules is necessary, and finding a breach may not be made contingent on the finding of fault in the field of public procurement.⁴⁷

This approach is reflected in the EFTA Court’s *Fosen-Linjen* Judgment, where it indicates that:

[...] it has already been established that *a national rule making the award of damages conditional on proof of fault or fraud would make actions for damages more difficult and costly, thereby impairing the full effectiveness of the public procurement rules [...]*. The same must apply where there exists a general exclusion or a limitation of the remedy

⁴⁶ See above (n 4).

⁴⁷ Schebesta (n 8) 67–68.

of damages to only specific cases (sic). *This would be the case, for example, if only breaches of a certain gravity would be considered sufficient to trigger the contracting authority's liability*, whereas minor breaches would allow the contracting authority to incur no liability.⁴⁸

In other words, the EFTA Court is not willing to tolerate a situation where what could be termed *de minimis* breaches of EU/EEA public procurement law remain unchallenged.⁴⁹ The Court thus seems to consider that the establishment of an almost absolute right to claim damages is necessary to ensure the desirable effectiveness of EU/EEA procurement law, and seems to base this on the double rejection of (i) the inclusion of a subjective element in the assessment of the contracting authority's behaviour, as well as (ii) conditioning the existence of a right to damages to a proportionality assessment derived from a requirement of *seriousness* of the underlying breach of EU public procurement law – which the EFTA Court considers functionally equivalent.

However, it seems difficult to compare the subjection of damages to a subjective requirement of fault with the subjection of damages to an objective requirement of seriousness of the triggering infringement (or, in other words, a proportionality assessment). As mentioned above, because these requirements are operationalised at different layers of the architecture of damages in procurement. Additionally, because it pitches two different issues against each other: one, of an objective nature (sufficient seriousness) and the other of a subjective nature (fault), which can also carry very relevant differences in their discoverability and the linked burden of proof. In that regard, the rhetorical strategy employed by the EFTA Court in identifying risks of ineffectiveness linked to 'a general exclusion or a limitation of the remedy of damages to only specific cases' artificially inflates the problem of the requirement of seriousness in the breach without recognising that this is exactly the rule that applies in every setting where strict or objective liability does not apply⁵⁰ – and that, logically, strict liability is compatible with a requirement of seriousness, as strict liability is not the same as unconstrained or total liability.

The EFTA Court also considers that:

'[a] requirement that only a breach of a certain gravity may give rise to damages could also run contrary to the objective of creating equal conditions for the remedies available in the context of public procurement. Depending on the circumstances, a breach of the same provision on EEA public procurement could lead to liability in one EEA State while not giving rise to damages in another EEA State'.

⁴⁸ *Fosen-Linjen* (n 21) para 77 (emphasis added).

⁴⁹ In that regard, the Court seems to have been influenced by the European Commission's position that 'any infringement of public procurement law should be followed up and should not be left unattended because the breach is not "sufficiently serious"'; *Fosen-Linjen* (n 21) para 59.

⁵⁰ Cf *Kotsonis* (n 21) text accompanying footnote 29.

However, this is by no means obvious, in particular if the preliminary reference mechanism works appropriately.⁵¹

This approach is objectionable on several grounds. To begin with, even if it is generally accepted that procurement remedies cannot be subjected to a requirement of fault,⁵² that does not mean that actionable damages under the Remedies Directive need to be exempted from the conditions of the general State liability doctrine. In particular, because the evolution of the State liability doctrine has clearly resulted in its objectification and given rise to a consistent practice where the subjective element of a breach of EU law is not taken into account.⁵³ As is well known, under the doctrine of State liability for breach of EU law,⁵⁴ the CJEU defined a broad test to assess whether an infringement of EU law is ‘sufficiently serious’.⁵⁵ This was first fully enounced in *Brasserie du Pêcheur/Factortame III*,⁵⁶ and has then been progressively refined in the case law of the CJEU. The test was designed in the following terms:

[...] finding that a breach of [Union] law is sufficiently serious is whether the Member State ... concerned manifestly and gravely disregarded the limits on its discretion. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national ... authorities, *whether the infringement and the damage caused was intentional or involuntary*, whether any error of law was excusable or inexcusable, the fact that the position taken by a [Union] institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to [Union] law.⁵⁷

In subsequent case law, the CJEU has stressed that the:

[...] condition requiring a sufficiently serious breach ... implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of

⁵¹ *ibid* para 78.

⁵² *Strabag* (n 3). See also Case C-275/03 *Commission v Portugal* EU:C:2004:632.

⁵³ Albert Sanchez-Graells, ‘Assessing the Public Administration’s Intention in EU Economic Law: Chasing Ghosts or Dressing Windows?’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 93, 116–119.

⁵⁴ For general discussion, see Paul Craig and Gráinne De Búrca, *EU Law. Texts, Cases and Materials*, 6th edn (Oxford University Press, 2015) 257–61.

⁵⁵ This requirement has been found to be the most difficult condition for a claimant to establish in a State liability case; see the T Lock, ‘Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich’ (2012) 49 (5) *Common Market Law Review* 1675, 1693.

⁵⁶ *Brasserie du Pêcheur* (n 2).

⁵⁷ *ibid* paras 55 and 56 (emphasis added). See also Judgment of the Court of Justice of the European Union of 4 July 2000 in Case C-424/97 *Haim* EU:C:2000:357; and of 4 December 2003 in C-63/01 *Evans* EU:C:2003:650.

discretion left by that rule to the national authorities.⁵⁸

[Additionally,] where at the time when it committed the infringement, the Member State in question [...] had only considerably reduced, or even no, discretion, the mere infringement of [Union] law may be sufficient to establish the existence of a sufficiently serious breach.⁵⁹ [Consequently,] the Member State's discretion, which is broadly dependent on the degree of clarity and precision of the rule infringed, constitutes an important criterion in determining whether there has been a sufficiently serious breach of [Union] law.⁶⁰

At first reading, the inclusion of a subjective element ('whether the infringement ... was intentional or involuntary') amongst the conditions that can be taken into consideration to determine whether an infringement of EU law is 'sufficiently serious' seems to create a clash with the need to exclude any element of fault in the regulation of remedies for infringements of EU public procurement law. However, a closer look at the case law of the CJEU and its evolution shows that this element has not been given significant weight in the application of the State liability doctrine.⁶¹ Given that State liability 'cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of [Union] law',⁶² there has been no relevant assessment of subjective elements in the behaviour of the public administration at the point of engaging State liability.⁶³

The assessment of the sufficient seriousness of the breach of EU law by the Member State has been objectified and redirected towards an analysis of its respect to the limits of whatever levels of discretion it enjoyed under the relevant provisions. Where there is no discretion, the assessment of intention becomes totally irrelevant. Indeed, where the CJEU had the necessary information to apply the test and determine whether the facts must be held to constitute a sufficiently serious breach of Union law

⁵⁸ Judgment of the Court of Justice of the European Union of 25 January 2007 in Case C-278/05 *Robins and Others* EU:C:2007:56, para 70; of 16 October 2008 in Case C-452/06 *Synthon* EU:C:2008:565, para 37; and of 19 June 2014 in Case C-501/12 *Specht and Others* EU:C:2014:2005, para 102.

⁵⁹ Judgment of the Court of Justice of the European Union of 23 May 1996 in Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)* EU:C:1996:205, para 28; of 8 October 1996 in Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* EU:C:1996:375, para 25, and of 18 January 2001 in Case C-150/99 *Stockholm Lindöpark* EU:C:2001:34, para 40. See also *Robins* (n 58) para 71; *Synthon* (n 58) para 38.

⁶⁰ *Synthon* (n 58) para 39. See, to that effect, *Robins* (n 58) paras 72 and 73.

⁶¹ See Takis Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 (2) *Common Market Law Review* 301, 310. For discussion, see Julio Baquero Cruz, 'Francovich and Imperfect Law' in Miguel Poiarés Maduro and Loic Azoulai (eds) *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 418, 423 ff.

⁶² *Brasserie du Pêcheur* (n 2) para 80. The situation is different when it comes to the liability of EU institutions, where the case law regarding fault requirements is much less clear. See Pekka Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond*, *Modern Studies in European Law* (Hart, 2011) 47-51.

⁶³ Indeed, there is a distinction between establishing liability independently of intention and then imposing a remedy that takes intention into account. This can be particularly relevant in relation to compensation claims.

in a case where the competent national institution had no substantive choice, the CJEU did not assess whether the infringement was intentional or involuntary and simply relied on the objective situation created by the public administration concerned.⁶⁴ Where there is very limited discretion, the CJEU does not engage in any subjective assessment either and applies a test of strict liability.⁶⁵ Where there is broader discretion, the analysis revolves around the clarity and precision of the rule infringed, and the CJEU tends to restrict its analysis to an objective assessment of whether the interpretation followed by the Member State was reasonable or excusable, but it does not delve into subjective assessments.⁶⁶

Moreover, the more recent case law of the CJEU on liability derived from *judicial breaches of EU law* can provide some additional support to the claim that, generally, the test applicable under the second condition of the State liability doctrine does not give any significant weight to the subjective element requiring a determination of whether the infringement was intentional or involuntary – or, in other words, that the assessment needs to be reconfigured as an objective test. In that regard, even if it has shown some deference towards infringements of EU law by national courts, as compared to infringements by the executive or the legislator,⁶⁷ the CJEU still has rejected the limitation of State liability to cases of intentional fault and serious misconduct on the part of the court, and stressed that

[...] although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of [Union] law attributable to a national court adjudicating at last instance, under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law.⁶⁸

In view of all the above, it seems clear that the subjective element that can, in principle, be taken into consideration under the second condition for State liability not only has not played any significant role so far, but it cannot do so in the future because Member States cannot impose fault-based requirements stricter than a test of manifest infringement of the applicable law.⁶⁹ It is submitted that this erodes, if it does not completely eliminate, any inconsistency with the need to ensure that the same objectified approach controls the regulation of public procurement remedies – thus significantly damaging the foundations of the reasoning of the EFTA Court in *Fonsen-Linjen*.

⁶⁴ Judgment of the Court of Justice of the European Union of 28 June 2001 in Case C-118/00 *Larsy* EU:C:2001:368, paras 39 ff.

⁶⁵ *Synthon*, (n 58) paras 41 to 43.

⁶⁶ *Robins* (n 58) paras 78 to 82. In less clear terms, Case C-501/12 *Specht*, para 103.

⁶⁷ For discussion of the standard, see Björn Beutler, ‘State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?’ (2009) 46 (3) Common Market Law Review 773. Cf Nicolo Zingales, ‘Member State Liability vs. National Procedural Autonomy: What Rules for Judicial Breach of EU Law?’ (2010) 11 (4) German Law Journal 419.

⁶⁸ Case C-173/03 *Traghetti del Mediterraneo*, EU:C:2006:391, para 44.

⁶⁹ *Köbler* (n 6) paras 53 to 56.

Moreover, in my opinion, the EFTA Court's general line of reasoning against the tolerance of 'non-persecuted' breaches of EU public procurement law conflates two separate issues. First, whether any infringement of EU/EEA substantive law should trigger a ground for the review of the procurement decision concerned and, if justified, to set it aside. Second, whether any infringement of EU/EEA substantive law should provide a right to claim damages. This is once more based on a very formal reading of *Strabag*, where the CJEU indicated that:

'the remedy of damages [...] can constitute, *where appropriate*, a *procedural alternative* ... only where the possibility of damages being awarded in the event of infringement of the public procurement rules is no more dependent than the other legal remedies ... on a finding that the contracting authority is at fault'.⁷⁰

However, this does not mean that damages and other remedies must be absolutely interchangeable and always subjected to the same conditions. It simply implies that, the same way that other remedies cannot be conditional upon a requirement of fault, neither can damages claims. This is uncontroversial, but hardly a good reason to consider that all remedies must be subjected to a trigger of simple breach of EU public procurement law.

By conflating both issues, the EFTA Court implicitly assumes that claims for damages are the only effective remedy, or that they can only be an effective remedy where they are equally available as other remedies (such as declarations of infringement, or the setting-aside of procurement decisions). In doing that, the Court does not take into account the existence of public oversight mechanisms able to 'pick up' on those *de minimis* infringements of EU/EEA public procurement law, and seems not to think it possible for disappointed tenderers to exercise rights of review in the absence of the financial incentives resulting from damages claims. This comes both to establish a hierarchy of remedies that is absent in the Remedies Directive,⁷¹ and to create the same risk of deformation of EU tort law that we have witnessed in other areas of EU economic law.⁷² Moreover, this does not take into account important issues of balance in the public and private enforcement of EU economic law, which can hardly be properly addressed through piecemeal evaluation of different aspects of the system.⁷³ These are important issues of design of the overarching architecture for the enforcement of EU public procurement law, and they are further discussed in the conclusion (see below section 4).

⁷⁰ *Strabag* (n 3), para 39 (emphasis added).

⁷¹ Sanchez-Graells (n 45).

⁷² See Okeoghene Odudu & Albert Sanchez-Graells, 'The interface of EU and national tort law: Competition law', in Paula Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017) 154–183; as well as the rest of contributions to that volume.

⁷³ Acknowledgedly, a problem that also affects the way in which preliminary references to the CJEU operate. However, an assessment of this issue exceeds the possibilities of this paper.

3.2 NORMATIVE CONTRADICTIONS ON THE IMPLICATIONS FOR CONTRACTING AUTHORITIES AND TENDERERS

As mentioned above, one of the important normative aspects on which the EFTA Court built its *Fosen-Linjen* Judgment concerns the incentives that different liability thresholds and requirements create for contracting authorities and economic operators. In that regard, the Court seems to adopt two contradictory normative standpoints in dealing with the twin question of the threshold for liability and the causality requirement – which are indivisibly interlinked in its overall finding that 'A *simple breach of public procurement law is in itself sufficient* to trigger the liability ... *provided* that the other conditions for the award of damages are met, including, in particular, *the condition of a causal link*'.⁷⁴ The contradiction is as follows.

On the one hand, the EFTA Court considers that a simple infringement of EU/EEA public procurement rules must suffice to trigger liability because:

[...] damages seek to achieve a three-fold objective: to compensate for any losses suffered; to restore confidence in the effectiveness of the applicable legal framework; and *to deter contracting authorities from acting in such a manner, which will improve future compliance with the applicable rules. Liability through damages may also provide a strong incentive for diligence in the preparation of the tender procedure, which will, ultimately, prevent the waste of resources* and compel the contracting authority to evaluate the particular market's features. Were liability to be excluded, this may lead to a lack of restraint of the contracting authority.⁷⁵

Thus, in this part of the Judgment, the EFTA Court considers a high likelihood of liability in damages a proper incentive for adequate diligence and decision-making on the part of the contracting authority. Conversely, when assessing the causality requirements for the recognition of a right to damages compensation (in the context of the fourth question referred by the Norwegian court), the EFTA Court stresses that:

[...] there must be a balance between the different interests at stake. While liability of the contracting authority for any errors committed promotes, in principle, the overall compliance with the applicable legal framework, *exaggerated liability of the contracting authority could lead to excessive avoidance costs, reduce the flexibility of the applicable framework and may even lead to the unjust enrichment of an unsuccessful tenderer. Furthermore, excessive liability may provide an incentive for a contracting authority to complete award procedures, that were evidently unlawful, or impinge upon the freedom to contract*.⁷⁶

⁷⁴ *Fosen-Linjen* (n 21) para 82 (emphasis added).

⁷⁵ *ibid* para 76 (emphasis added).

⁷⁶ *ibid* para 101 (emphasis added).

This clearly indicates that the existence of liability needs to be constrained or modulated. The EFTA Court seems to want to do so by establishing a complicated approach to causality requirements that would distinguish between those applicable to claims for negative and positive damages (ie bid costs and loss of profits). This may have been justified due to the peculiarities of the Norwegian tort law system, but it is difficult to square with the general mechanism of liability in damages under EU law. Moreover, even in the context of the first question, the EFTA Court had already shown some inconsistency when establishing that: 'a claim for damages can only succeed if certain other conditions are fulfilled, such as the condition that *there must be a sufficient causal link* between the infringement committed and the damage incurred'⁷⁷ – which, however, is not equally reflected in the wording of its general finding, which only makes reference to 'the condition of a causal link'.⁷⁸ What the EFTA Court intended with the qualifier of 'sufficient' causal link, and how this results in a functional approach that materially differs from the requirement of a 'serious' rather than a 'simple' breach is left unexplained.

In my view, the approach (implicitly) followed by the EFTA Court is not better than the alternative approach of having closely stuck to a requirement for a sufficient breach of EU/EEA public procurement rules. Even if a combination of low liability threshold (simple breach) and high causality requirements ('sufficient causality') could lead to the same practical results that a requirement for 'sufficiently serious breach' (with simple causation analysis), the EFTA Court's approach creates legal uncertainty and more scope for divergence across EU/EEA jurisdictions, not the least because causation is within the remit of domestic law.⁷⁹ In addition, it comes to preclude one of the mechanisms built into EU law – in particular the doctrine of State liability—to mitigate its effects. This is done by requiring both sufficiently seriousness of the breach and direct causality in the creation of the recoverable damage. By suppressing the first, the EFTA Court *Fosen-Linjen* Judgment places all pressure on the causality mechanism, which can also have distortive effects if existing causality tests need to be adapted to compensate for the suppression of the other check of the system. More importantly, this approach can create a wave of litigation based on any (minimal, formal, irrelevant) errors in the conduct of procurement procedures in an attempt to test the boundaries of the trigger for liability in damages.

On the whole, it would have been preferable to stick to the general framework of the State liability doctrine as specified in the Remedies Directive, which is compatible with a finding of a requirement for there to be a 'sufficiently serious breach' of EU/EEA procurement law and, at the same time, with a finding that breaching a provision for which interpretation and application the contracting authority has no discretion (eg the obligation to be in a position to verify the content of tenders against its requirements and award criteria, as in *Fosen-Linjen*) suffices to trigger liability (the same way that the mere lack of transposition of a Directive triggers State liability under the general test).

⁷⁷ *ibid* para 81 (emphasis added).

⁷⁸ *ibid* para 82.

⁷⁹ Cf Kotsonis (n 21) text accompanying footnote 32.

For all the reasons discussed so far, it seems clear that the EFTA Court's *Fosen-Linjen* Judgment is not reflective of the state of EU public procurement law, but rather an exercise of judicial activism aimed at pursuing a particular understanding of the need for and role of private enforcement through damages claims. The EFTA Court seemed to find the current approach based on minimum harmonisation and the subjection of damages claims to the pre-existence of sufficiently serious breaches of EU public procurement law unsatisfactory, and it took it upon itself to push for a change of this situation. In my view, it did so improperly, for the reasons already discussed.

Trying to bring the different strands of the discussion together, in the following conclusions, I reflect on whether the discontent with the EU public procurement damages system underlying the *Fosen-Linjen* case could be addressed through a reform of the Remedies Directive aimed at maximum harmonisation, as well as on whether a significant boost of private enforcement of EU public procurement law would be desirable.

4 CONCLUSIONS

As has emerged from the previous discussion, and beyond the issue of the more than difficult fit of the *Fosen-Linjen* Judgment with the previous CJEU case law, and in particular *Spjiker*, most of the normative reasons provided by the EFTA Court to support the position that a *simple* breach rather than a *sufficiently serious* breach of EU public procurement law should trigger potential liability in damages involve arguments concerning the need to increase legal certainty through higher levels of harmonisation (ie maximum harmonisation) as well as the need to facilitate the private enforcement of EU public procurement rules to increase their effectiveness. In this concluding section, I partially take issue with both claims.

Firstly, the EFTA Court seems to assume that designing an EU/EEA wide maximum harmonisation set of rules for the award of damages in the context of public procurement is not only desirable, but also (relatively easily) feasible. Even if it was accepted that maximum harmonisation was desirable, and despite the potential advantages derived from a revision of the system to achieve maximum harmonization, given the vast differences in the rules on damages claims across EU jurisdictions, it would be certainly difficult, if not outright impossible, to reach an agreement on the adequate level of protection and the relevant procedural mechanisms.⁸⁰ This is not unique to public procurement, but reflects more broadly the difficulties in the approximation of private law within the EU/EEA. Given these practical difficulties, I would not think the European Commission would be willing to engage in the exercise

⁸⁰ For comparative discussion, see for example, the contributions to Treumer & Lichère (eds), *Enforcement of the EU Public Procurement Rules* (n 3), and to Duncan Fairgrieve & Francois Lichère (eds), *Public Procurement Law. Damages as an Effective Remedy* (Oxford, Hart 2011); see also Schebesta (n 8) 75–154. See also the contributions to Torricelli & Folliot-Lalliot (eds), *Oversight and Challenges of Public Contracts* (n 45), although these are mainly focused on administrative law aspects of the domestic transposition of the Remedies Directive.

of designing such maximum harmonization mechanisms, even if it decided to propose a revision of the Remedies Directive in the future. What then should not be acceptable is for such maximum harmonisation to be achieved or imposed through an excessively broad interpretation of the Remedies Directive as, in my view, the EFTA Court's *Fosen-Linjen* judgment does.

Moreover, I think it is worth stressing that, in addition to the practical difficulties derived from the dispersion of solutions implicit in the current minimum harmonization of procurement remedies, and the not smaller difficulties in attempting a maximum harmonization, there are also structural tensions in the use of damages actions for the enforcement of EU public procurement rules. As recent research has clearly shown,⁸¹ the use of damages actions (either based on *Francoovich* liability, or sector-specific rules) for the enforcement of substantive EU law creates distortions in the domestic legal systems of the Member States. From that perspective, both the minimum and maximum harmonization approaches are problematic.

From the minimum harmonization perspective, because the existence of two tiers of protection at domestic level (on enforcing the EU standard and a potential second tier enforcing more demanding rules) can also result in two tiers of regulation and/or case law concerning the interpretation and application of the rules, which is bound to create legal uncertainty. For example, if issues around the effectiveness of the remedy in the EU-tier create pressures on the interpretation of the domestic-tier remedies as a result of reverse pressures resulting from the principle of equivalence – *ie* the domestic remedy can hardly be both broader in scope and less effective in its consequences.

From the maximum harmonization perspective, because the creation of a one-size-fits-all remedy (such as that derived from the lower threshold for damages liability in the EFTA Court's Judgment) can have rather drastic impacts for some Member States (in particular, those without a 'higher-tier' domestic protection). Those impacts could be felt not only in the area of procurement law, but also in other areas of (economic) law which regulation and case law can be distorted as a result of the EU rules. For example, establishing a lower trigger of potential liability in damages for the breach of procurement rules than that applicable under the State liability doctrine in relation to general internal market law could create significant pressures on the interpretation of the 'concept' of procurement as litigants sought to fit different types of market-regarding public activity within the context of procurement.⁸²

More generally, it is worth emphasising that there will be issues of (non)compliance with the EU public procurement rules that may be ill-suited for damages claims, and that there is a clear difficulty in assuming that generous procurement damages rules are in the public interest, given that all pay-outs reduce the funds available for the discharge of public sector obligations – in a notable difference with damages in other areas, such as EU competition law. This requires Member States to retain (or create) a

⁸¹ Giliker (n 72).

⁸² It is worth noting that the concept of procurement is triggering significant litigation already; see eg Judgment of the Court of Justice of the European Union of 2 June 2016 in Case C-410/14 *Falk Pharma* EU:C:2016:399. See also Opinion of AG Campos Sánchez-Bordona of 13 December 2017 in Case C-9/17 *Tirkkonen* EU:C:2017:962 (not available in English).

robust public enforcement mechanism. This was one of the missed opportunities in the revision of the EU public procurement rules in 2014,⁸³ but the perceived weakness of the public enforcement mechanisms cannot be compensated with a boost of private enforcement through distortive adaptations of general EU law doctrines (State liability) and/or domestic private law institutions (mainly tort law).

Thus, it seems adequate (and it may not be too late...) to reconsider a drastic change in the enforcement strategy to reduce the current over-reliance on tenderer-led administrative and/or judicial reviews, and to start to move away from damages-fuelled private enforcement of EU public procurement law and towards a more robust architecture of public enforcement with a restriction of damages compensation solely in exceptional cases – certainly where that compensation goes beyond direct participation costs. Discussing the possibilities of doing so and the challenges it implies far exceeds the possibilities of this paper, but given that reaching a ‘happy median’ in the regulation of (private) damages actions in the context of procurement remedies in the EU would not be a minor feat, it may be time to (re)open the discussion.

⁸³ Pedro Cerqueira Gomes, ‘A Lost Proposal in the 2014 Public Procurement Package: Is there any Life for the Proposed Public Procurement Oversight Bodies?’ in Grith Skovgaard Ølykke & Albert Sanchez-Graells (eds), *Reformation or Deformation of the EU Public Procurement Rules* (Edward Elgar, 2016) 170–190.